



State of Utah

GARY R. HERBERT

Governor

SPENCER J. COX

Lieutenant Governor

TODD E. KISER

Commissioner

Insurance Department

State of Utah Title & Escrow Commission Meeting Meeting Information

Date: April 3, 2017

Time: 9AM

Place: East Building, Copper Room

MEMBERS

COMMISSION MEMBERS

xChair, David Moore (*Agency, Salt Lake County*) Matthew Jagerson (*Agency, Utah County*)
xVice Chair, Bob Rice (*Insurer, Ada County, ID*) xJeff Wiener (*Insurer, Salt Lake County*)
xSylvia Andersen (*Public Member, Salt Lake County*)

DEPARTMENT STAFF

xTodd Kiser, *Ins. Commissioner* xBrett Barratt, *Deputy Comm.* xPerri Babalis, *AG Counsel - TEC*
Suzette Green-Wright, *MC Dir.* xRandy Overstreet, *Licensing Dir.* xReed Stringham, *AG Counsel - UID*
xAngie Watson, *Examiner* xAdam Martin, *Examiner* xSteve Gooch, *PIO Recorder*

PUBLIC

Chase Phillips Carol Yamamoto Tim A. Krueger
Matt Sager James Swan Adam Back
Tyrone Johnson [PHONE] Kirk Smith [PHONE]

MINUTES — *Approved*

General Session: (Open to the Public)

- **Welcome** / David Moore, Chair (9:00 AM)
- **Telephone Roll Call**
- **Adopt Minutes of Previous Meeting**
 - Jeff requests a change to the last bulletpoint in the New Business section. It should be changed to read "Angie says it ~~makes~~ may make the escrow company a party to the contract..."
 - **Motion by Bob to adopt the amended minutes. Seconded by Jeff. Motion passes 4-0.**
- **Reports**
 - Concur with Licensee Report / Suzette
 - Angie says there are a few new open investigations. Most are for advertising and marketing violations. There have been 36 opened and 26 closed investigations in 2017. There are no new complaints.
 - There were 3 new enforcement cases sent to the AG's office as stipulation and orders.
 - Concur with Complaint & Enforcement Report / Suzette
 - There were a few new and a few reinstated agency licenses.
 - There were quite a few new and a few lapsed individual licenses. The department will send out letters to the lapsed licensees.
 - **Motion by Jeff to concur with both the licensee and enforcement reports. Seconded by Bob. Motion passes 4-0.**
 - Request for Dual Licensee Expedited Request: None
 - Request for Attorney Exemption: None
- **Administrative Proceedings Action** / Bret Randall, ALJ
 - Stipulation and Order:
 - Heritage Title Insurance Agency (ENF #3866)

- In January, the department got a complaint that Tiffany Hill had listed a property on December 13 on the MLS as an owner and agent of a real estate brokerage business while also being the owner and qualifier for Heritage Title Insurance Agency.
- She cooperated with the investigation and took appropriate action. She agreed to a \$2,000 forfeiture.
- David discloses that Tiffany called him and he advised her to contact the department.
- **Motion by Jeff to concur. Seconded by Sylvia. Motion passes 4-0.**
- Wasatch Title Insurance Agency (ENF #3871)
 - During a normal review of the department's records, it was discovered that Wasatch Title Insurance Agency's license had lapsed for 3 weeks. All of the agency's producer associations were terminated as of September 30.
 - The respondent performed 26 closings and issued 48 commitments during the lapse, and used unassociated producers on those closings and commitments.
 - The respondent has had two previous lapses during which it performed closings, issued commitments, and used unassociated producers. Forfeitures were assessed in both cases.
 - The respondent cooperated with the investigation and has agreed to a \$3,000 forfeiture.
 - Sylvia notes that there is language in the stipulation and order that if the respondent does the same thing again, there could be a \$5,000 forfeiture. She asks if this language was added afterward. Reed says he believes the notification applies to this particular order. It's limited to the certain facts and circumstances of this particular case. Brett points out that the passage says it's up to \$5,000 per violation. Under the department's general forfeiture and penalty statute, the maximum allowable forfeiture for an agency is \$5,000 per violation, and \$2,500 violation for an individual.
 - Sylvia asks if Wasatch has made the same violation 3 times in a row. Adam says it's alternating skipped renewals: in the past 6 renewals, they have missed 3 of them. This time he wanted something in place that would prevent it from happening again. The agency has hired someone to watch their renewal timeline so it doesn't happen again. He notes that we could suspend the agency's license for a month, but that would affect all the individuals associated with them.
 - **Motion by Jeff to concur. Seconded by Sylvia. Motion passes 3-1.**
 - **Bob votes nay and says he disagrees with the system for fining someone for a delay in licensing. He says there should be a period during which a renewal is retroactive.**
- Order to Show Cause: None
- Informal Adjudicative Proceeding and Order: None
- Notice of Formal Adjudicative Proceeding: None
- **Board Duties & Responsibilities / Perri**
- **New Business**
- **Old Business**
 - Update on commissioner terms / Steve
 - The Title & Escrow Commission has openings for 4 commissioners: 1 agency, 2 insurers, 1 general public. As of April 3, there are 2 applicants. David directs the department to send out an email to all individual agents requesting applications. Bob notes that we should send it to insurers as well.
 - Recommendations must be sent to the Governor's Office by April 15, due to the confirmation process. Brett notes that the Senate is scheduled to meet again in June. If names aren't submitted by April 15, statute states that existing commissioners shall continue to serve until a replacement is named.
 - Update on department website regarding "active" vs. "authorized" status / Randy

- Utah Interactive has not assigned anyone to the job, as of a week ago, but should have someone ready to start by May 1. If that happens, the project should be done within a month or so. Randy anticipates that it will happen in May, but it hasn't been totally firmed up.
- David asks if there's anything else that can be done to the site in the meantime. Randy says what can be done has been done. Nothing can be done to Agent Search, but there's already language up on the UID website.
- David asks if there has been anything from PSI regarding test questions. Randy says he asked if we could get an exam review workshop date and they suggested late June or early July. We don't have a firm date or location yet.
- Real Estate Division earnest money committee update / Angie
 - At the last meeting, the committee proposed a statute change or an additional rule (R592-18) regarding earnest money. They want to give the title company the authority to determine who the earnest money can be released to, based on the purchase contract. The DRE also put together an addendum to the purchase contract. Angie notes that one of the DRE committee members wrote the proposed R592-18 and the statute change.
 - Sylvia asks what "substantial delay and cost" means in the rule. Angie says it informs the consumer that if a title company holds the money, the title company may or may not agree with whose money it is if a deal isn't completed. This could tie the money up in court.
 - David says they just had a transaction where a contract expired because due diligence wasn't done, therefore the earnest money should have been given to the seller, but the buyer is adamant that they should get their money back. The title company held the money until they agreed. The problem occurs when the parties don't come to an agreement — then the title company keeps holding the money.
 - Angie notes that the DRE wants to have the addendum approved this week. She notes that, regarding the statute change and the proposed R592-18, it's an either/or thing: Ultimately it will be one or the other, but not both.
 - Bob asks what happens if the buyer and seller sign the addendum, but the title company doesn't want to hold the ~~escrow~~ earnest money. He notes that this is a contract addendum that sets duties on ~~the subject~~ a person or entity that is not a party to the contract. He says the DRE can do whatever they want, but he sees some inherent flaws in the form itself. Brett asks who would hold the earnest money in this case; Bob says it would be the broker.
 - David says historically it was the broker that held the money, but over the last few years it has been moving toward the title agency.
 - David asks if the statute gives the commission authority to create the rule; usually there's a provision that allows the rule to be enacted. Do we need an AG's opinion on whether the commission has that authority? Secondly, there's specific language in the REPC regarding disbursement; currently it says if the contract isn't completed, the money is returned.
 - Matt Sager says as the rule and language is proposed, it focuses on what the contract states. Until the contract is amended, we shouldn't be looking at a rule or statute saying that a title company should disburse according to the contract. The contracts currently don't sufficiently address earnest money. His worry is that if every contract has to include the addendum, it won't be signed every time. The title company will be in a position where their hands will be tied due to statute or rule and a lack of addendum. There won't be sufficient instructions. Holding earnest money is very expensive, and if the department and commission are looking at the rule, it needs to include a provision that the title company is entitled to get its fees back.
 - Angie says fees were discussed during the meeting. At the DRE, the winning party is awarded the fees, but the winning party is either the seller or buyer, not the title company. Matt notes that once a title company is asked to hold the earnest money, there is a cost and expense for it. If the transaction fails, the title company is out. Title companies are expected to not run at a loss, but if they accept earnest money and a transaction fails, they operate at a loss. There's an inherent conflict between the department's rules and the ability for a title company to hold earnest money.

- Bob says in the statute the only thing that allows a title agency to do escrow is the issuance of a policy. Accepting earnest money puts the cart before the horse. There's an argument that a title agency should not be able to accept earnest money, period. Otherwise they risk violating escrow statutes if the transaction fails.
- Bob thinks a more appropriate rule would be one that prohibits title companies from holding earnest money deposits because it violates statutes.
- Sylvia asks if there is any regular communication between the Title and Escrow Commission and the Real Estate Commission. Brett says no, but Angie participates on the subcommittee and working group. Jeff asks if the meetings are open to the public. Angie says it hasn't been because there are only 5 people on the subcommittee. Jeff asks if submitting the statute, rule and addendum at the Title and Escrow Commission meeting is the attempt to get industry input. Angie says there will be a town hall meeting at the end of April to get industry feedback.
- Sylvia asks if it's possible to organize a quarterly or biannual meeting between both commissions. It seems like they're integral to one another, but things are happening on the real estate end that is putting a burden on title and escrow. Commissioner Kiser says he can address this with the Department of Commerce. The Fraud and Licensing divisions have quarterly meetings with Commerce to deal with bad actors. He will bring it up at their regular meeting, which is happening today. Sylvia thinks if both committees were able to meet, there would be a better confluence of information. Carol Yamamoto agrees because a lot of agencies don't even have a trust account to hold the earnest money.
- Jeff asks when the DRE is expecting to have comments back. Angie says toward the end of April. Jeff proposes having the department send the forms to those who have requested meeting notices, noting that comments must be returned to the department by a certain date.
- David says that in escrow states like California, escrow is created when funds are deposited under the conditions of an agreement. As soon as a title company accepts earnest money, it's an escrow. We need to be more proactive about getting a signed agreement that includes the terms, fees, etc.
- Bob asks what ability a title agency has legally to enter into the escrow agreement. David says none under the REPC. Bob says they can do escrow if three conditions are met, one of those being if a title policy is issued. If you allow title agents to use this exception to do escrow when policies aren't issued, you'll have situations where a title agent is acting as an escrow agent outside the scope of their authority. Then the safeguard that was put in place by statute is gone; it subverts the whole purpose of the statute. Commenting on the addendum overlooks whether a title agency can accept an earnest money deposit at all.
- **Jeff suggests adding a discussion of the proposed R592-18 to the May agenda.** Once we have a chance to review the proposed rule, we can make some defined comments. Next month we can get feedback from the department about when the Title and Escrow Commission and Real Estate Commission can meet. His concern is that this is brought to Title and Escrow, but the timing doesn't work with what Real Estate wants.
- Jeff says the goal at the end of the day is to provide consumers with an economical, easy-to-understand process for closing a transaction. It's a good topic that consumers would like an answer to.
- Chase Phillips says a deposit of earnest money is an inherent part of an escrow transaction, in his opinion. He doesn't see it as taking an action that is in violation of the statute. Bob says the logic makes sense, but one of the specific provisions in statute is that title insurance must be issued. Chase notes that statute doesn't specify at what time in a transaction a policy must be issued. Bob says if a transaction fails but you've entered into an agreement to accept earnest money, then no policy is issued and you've violated the law.
- Matt is concerned that the language in the proposed statute authorizes the holding of earnest money and could allow the title agency to be directed to pay off personal property as part of the escrow instructions. This expands the scope of what a title agency does. The statute doesn't allow an escrow officer to reject the escrow in case of bad closing instructions.

- Brett asks if the commission would like Angie to email the chair of the Real Estate Commission that the proposed documents were brought up and discussed, but that the Title and Escrow Commission has serious concerns. Jeff notes that the commission doesn't have any official comment — it's just concerns. He thinks the response should be to thank Real Estate and note that Title and Escrow will put it on their agenda for May. We want interaction and discussion, but discussion of a title rule requires that it be put on the agenda in May. Brett wants to slow down DRE with regard to the addendum.
- Jeff thinks the addendum, statute and rule should be sent to ULTA for their comment.
- **Other Business**
- **Hot Topics**
 - Is a license required by an out-of-state escrow company for a transaction involving a Utah property / Chase Phillips
 - Chase has some involvement with national agencies doing business in Utah. There is a significant push for national agencies to come do work in Utah. There's only one line in statute that seems to have any bearing on who has to be licensed to conduct the closing.
 - 31A-23a-406(1)(g): "The individual title insurance producer or agency title insurance producer shall maintain a physical office in Utah staffed by a person with an escrow subline of authority who processes the escrow."
 - The national agencies who approached Chase have interpreted that line such that as long as they have someone licensed in Utah with an escrow line of authority who can review and direct staff, then they are in compliance. It doesn't say the people who do the work — conducting escrow, transferring funds, preparing documents, etc. — have to be licensed or located in Utah.
 - Chase says the rules he sees in Utah are clearly trying to say that business being done in Utah should be done by licensed people in Utah. He would like to know the commission's interpretation and whether it needs to be addressed.
 - David says he doesn't think the commission is here to give out legal opinions about what is and isn't appropriate, but it's a good discussion. He notes that 31A-23a-406.5 is very specific about who can do escrow: "Only an escrow agent or a title insurer in compliance with Subsection 31A-4-107(1)(a) and Section 31A-14-211 shall conduct escrow." He notes that 31A-14-211 is where we get the residency requirement.
 - Bob asks if these out of state companies are doing escrow in Utah or outside Utah. Chase says he can't speak for all of them, but he thinks they're doing both because of the nature of modern title software.
 - David notes that Suzette mentioned an ongoing investigation last month that involves Utah property, but an out-of-state closing. Angie says the department gets a lot of complaints of that nature.
 - Chase says national lenders are becoming more and more prevalent because of the increasingly national nature of business. As a local agent, you can't capture the business because it's generated in another state. He feels like the statute isn't entirely clear if it's under the direction of someone licensed in escrow. He also notes that national lenders often use traveling notaries, and he knows several real estate agents and escrow officers who do that on the side for extra income. He feels like there needs to be better clarification about who should be licensed in what when a closing happens.
 - David says there was a bulletin a few years ago that discussed the notary issue. It was OK as long as a notary isn't acting as an escrow agent, but that means notaries can't explain escrow documents. If they explain documents, they're acting as an escrow agent.
 - Sylvia asks if David is saying that Utah has no protection for a Utah buyer who goes out-of-state to a national company. David says yes. Sylvia says that needs to be addressed, possibly by the legislature. She says it's the commission's job to protect the Utah buyer.

- Brett asks about 406 and says he thinks if it's a Utah property, it needs to be a Utah-licensed person doing the deal and the escrow. Sylvia asks who is enforcing it. Brett says the department should be.
- Jeff notes that one of the commission's duties is to request that the commissioner direct the department to investigate and enforce matters that affect the industry. He says that how the department interprets 406(1)(g) could be different than how the industry acts, and we need to make sure it's explained appropriately. Brett says in his mind it's unlicensed activity.
- David clarifies that if you're an agent approached by a national escrow company that wants you to issue the commitment and the policy. If you do it, and they say they can close it through their software using people in Kansas City, and they're complying with the statute because you're working for them. Chase says he knows there are many other agencies operating that way in Utah. He says because he been approached by one, he's now being approached by more. He expects that more national companies will be doing the same thing across the industry in Utah over the next 10 years. His issue is similar to Sylvia's: If this is being done, do paying customers have the same recourse working with a national agency as they would with a local agency.
- Chase says most national agencies get a Utah resident license by opening an LLC and leasing space from an existing title agency. He says it's a pretty clear loophole, but he thinks it's licensed business.
- Bob asks what companies are approaching Chase to do. Chase discloses that he actively represents two national agencies already. They have him act as the qualified licensee to give direction, review active files as they're being closed, give approval, sign policies and commitments. Bob notes that this goes beyond escrow because he's actually issuing the policy and doing the escrow on behalf of the entity. Chase says yes.
- Bob says that when he hears about out-of-state escrow, he thinks of two people in another state working to consummate the sale of a property in Utah. If the buyer and seller go to the same escrow officer in that other state, money exchanges hands, that escrow company mails the documents and the policy is issued in Utah, but the title agency in Utah didn't have any part of the closing, would that be under the purview of Utah law? It's clear that if the escrow is being done by a national agency, they should be complying with the same rules that locals comply with. Chase says that's the scenario that arose in his situation. His current understanding is that if you have satisfied the licensing requirements and have someone appointed as qualified licensee directing the escrow operations for the agency, then you're licensed. But if they're only doing title, then are they really allowed to close escrow in Utah?
- David asks if an agent is approached by an out-of-state company to do title only, but he or she knows they'll be closing deals in another state without Utah brick and mortar. Is the company in violation and is the agent in violation?
- Adam says the nationals are only doing the escrow through finance, and finance only has 4 escrow companies registered through the Division of Finance.
- David asks about exempted escrow and whether that should be moved under the Insurance Department and the Title and Escrow Commission.
- Jeff says based on his reading of 31A-23a-406(1)(g), if you're going to be conducting title and escrow, it requires a license, maintaining a physical office, and it must be staffed by a person with an escrow subline of authority who processes the escrow. Under 406.5 that person needs to be licensed, but there's a mechanism for someone to have a nonresident license. He thinks the person in the physical office needs to be available to the public, but it doesn't mean they have to do all of the processing. It's defined in statute and definition that they can process the escrow. David asks who is the escrow agent doing the closing. Jeff says the agent would be the licensed title insurance agency that has a physical presence. David says it would be the same thing as working from home: They're not in the office, and they're the escrow processor but they're not the licensee. Jeff says that person would still need to be licensed if they're conducting escrow.

- Bob asks where the escrow is being done. What if none of the escrow is done in Utah? In its purest sense, escrow is a defined term. What if an escrow didn't occur at all in Utah? What if it's another state or country? Does the department have jurisdiction over that company or do they not? The nexus is probably property located in the State of Utah. Absent a statute that says escrow must be done by a licensee for property in the State of Utah, he doesn't know how the department can enforce its statutes and laws against something that takes place entirely in a different state or country.
- Chase says the common practice is escrow accounts in Utah with lenders in Utah. Then the money is transferred from here, but checks aren't always printed here. Some of the work isn't done in Utah, but the money is in Utah. Which part is escrow and which part isn't? Chase tends to agree with Jeff: If you've hit the licensing bulletpoints and have a qualified licensee, then that settles it.
- Brett says it seems simple to him: A licensee can do escrow if they have a physical office in Utah with an agent who processes the escrow. He doesn't think that allows you to have processing done anywhere. But he understands that the world is evolving and technology is creating efficiencies, so maybe it needs to be looked at.
- David thinks the term "processing" is part of the issue.
- Jeff thinks people need to be licensed, but if you can walk into an office and they can answer your questions or direct you to someone who can, that should be sufficient. The term "process" is ill-defined and there are a lot of parts to an escrow. What parts are title and what parts are escrow? The key is a physical office, an actual person, and an escrow subline of authority. As long as you have that, it should be OK.
- Chase feels like that's up to interpretation. He says it reads to him like it's under the agency license. As long as the agency is licensed, he doesn't think the individual who processes the file has to be licensed. Brett asks hypothetically if he's licensed in Utah, and he issues a title policy but farms out the escrow, is his underwriter liable if the escrow goes sideways? Jeff says to him it's clear: If the person is licensed in the state and appointed by their underwriter, then 407 kicks in.
- Jeff says he hopes the clarity provided today is that there must be a physical office under (1)(g), the person there must carry an escrow subline of authority, and processors have to be licensed in Utah whether resident or nonresident. He would hope the department would not enforce because not every process must be done in that physical office entirely. As long as the person there is licensed and can speak to the escrow or direct the escrow, then that would be compliant.
- David suggests changing the word "processed" to "supervised." Then you can have the escrow supervised by the escrow officer in any other place. Jeff suggests striking "who processes the escrow" because the whole statute deals with escrow.
- Bob brings up a hypothetical about Joe Smith in California who has a condo in Park City and sells his condo to Tom Clancy in California. They go to an escrow company in California and do the agreement. They prepare the deed themselves, one gives the deed to the escrow company and the other gives the money to the escrow company, then they swap them. Tom Clancy takes the deed and mails it to the recorder in Summit County, then goes to the local title agent to get title insurance. Did that escrow company in California violate Utah law? Brett and David say yes, probably.
- Jeff thinks there are some missing pieces in Utah, and those would be covered under RESPA lending guidelines. Clearly there will be instances where parties will want to deal with transactions in whatever state they're in because their property may be in multiple states. He thinks as far as consumers are concerned, this is consumer protection.
- Bob asks Matt Sager how escrow happens in Arizona. Matt says Insurance regulates title insurance, Financial Institutions regulates escrow licenses. Each branch has its own license in Arizona to handle escrow. If you're conducting escrow in Arizona, DFI regulates it; if it's done

outside the state, they don't look at it and it's under the jurisdiction of whatever state the transaction is done in.

- Jeff is concerned that at some point we will have an issue like we did with continuing education. That was a rule that had been in place for years, but then a stipulation and order came forward and the whole industry looked at it and had been seeing it differently. He is nervous that down the road the department may interpret it differently from the industry. He would like to look at the wording now to provide clarity. **Jeff requests adding a discussion of 31A-23a-406(1)(g) to the May agenda.**

Executive Session (None)

- **Adjourn** (10:54 AM)
 - **Motion by Bob to adjourn. Seconded by Jeff. Motion passes 3-0.**
 - **Sylvia abstains.**
- **Next Meeting: May 8, 2017** — Copper Room

2017 Meeting Schedule in Copper Room

Jan 9	Feb 13 (SOB B110)	Mar 13	Apr 3	May 8	Jun 12
Jul 10	Aug 14	Sept 11	Oct 2	Nov 13	Dec 11